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IN THE

Supreme Court of the United States

October Term, 1941.

No. 286

MAHOGANY ASSOCIATION, INC., and THOMPSON MAHOGANY COMPANY,
(Defendants-Appellees Below),
Petitioners,

vs.

BLACK & YATES, INC., THOMAS E. POWE LUMBER COMPANY and WALTER S. SCHIM,
(Plaintiffs-Appellants Below),
Respondents.

Petition for Writ of Certiorari and Brief in Support Thereof

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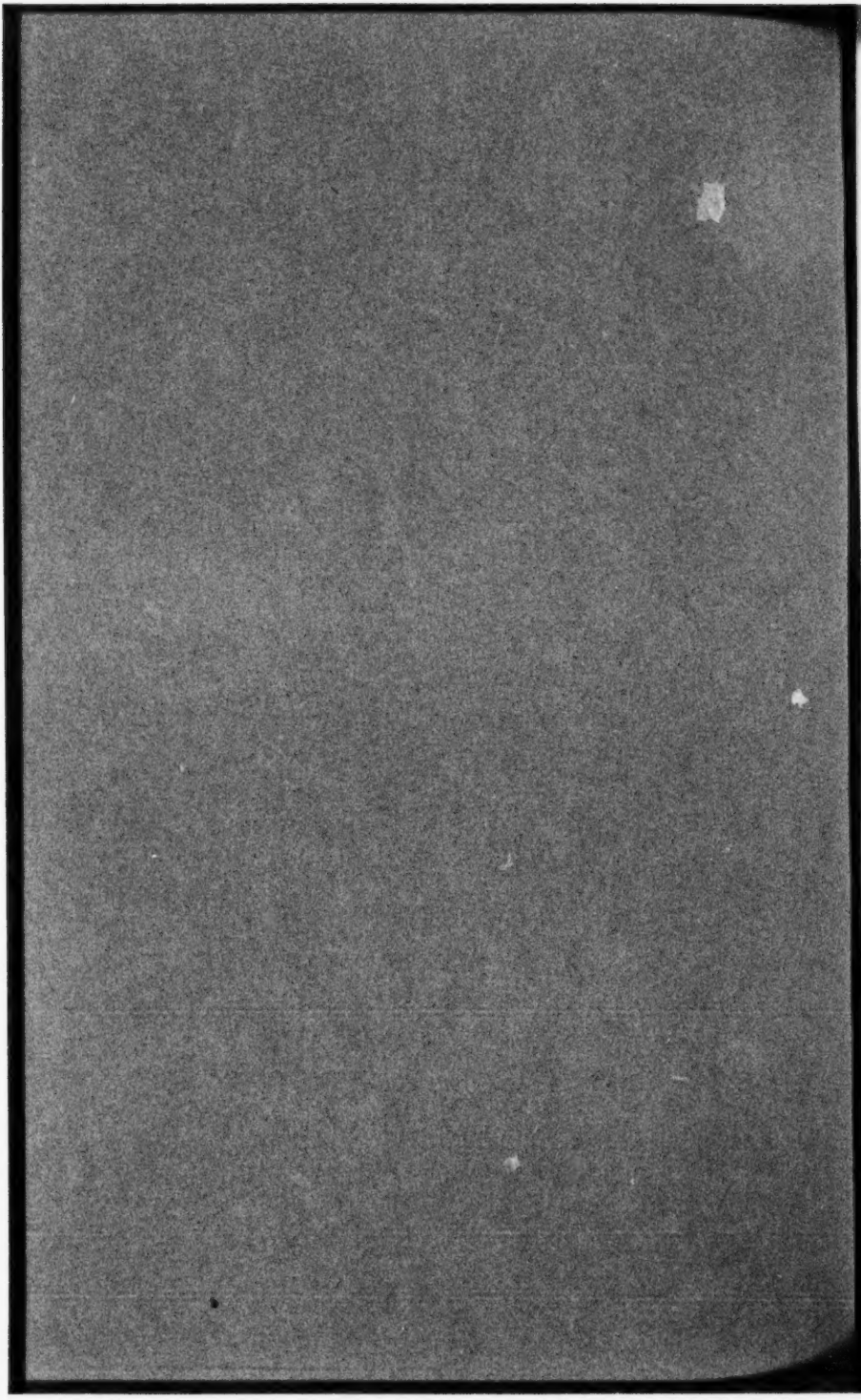

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IN THE

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No. . October Term, 1941.

MAHOGANY ASSOCIATION, INC., AND THOMPSON MAHOGANY COMPANY,
(Defendants-Appellees Below),
Petitioners,

v.

BLACK & YATES, INC., THOMAS E. POWE LUMBER COMPANY AND WALTER G. SCRIM,
(Plaintiffs-Appellants Below),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Mahogany Association, Inc. and Thompson Mahogany Company, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment entered in the above-captioned cause on June 10, 1942, on rehearing. On June 30, 1941, an opinion was filed by Judge Clark. A rehearing was granted by order dated August 18, 1941, and heard by the Court *en banc* on October 24, 1941. An opinion on rehearing was filed June 10, 1942, by Judge Biggs substan-

tially adhering to the original determination. Neither has been reported.

A certified transcript of the record, including the proceedings in said Circuit Court of Appeals, is presented herewith in accordance with Rule 38 of this Court.

I. Short and Summary Statement of the Matter Involved.

A. Parties and nature of the proceedings.

This is a suit in equity instituted in the United States District Court for the District of Delaware. Plaintiffs are Black & Yates, Inc., a New Jersey corporation, Thomas E. Powe Lumber Company, a Missouri corporation, successor to a firm of the same name, and Walter G. Scrim, a citizen of California. Defendants are Mahogany Association, Inc., a Delaware membership corporation, and one of its members, Thompson Mahogany Company, a Delaware corporation. The question arises on the pleadings.

The complaint is founded upon prior proceedings instituted *against plaintiffs* and their associates by the Federal Trade Commission, known as the "Philippine mahogany" case, reported in the test case of *Indiana Quartered Oak Co. v. F. T. C.*, 26 Fed. (2d) 340, cer. den. 278 U. S. 623, modified in 58 Fed. (2d) 182.

Plaintiffs and their associates deal in various kinds of woods grown in the Philippine Islands, differing from each other, having the common names of red lauan, white lauan, tanguile, almon, etc., produced by trees of the same names. Instead of selling these woods under their proper names, they have called them "mahogany" or "Philippine mahogany" in this country. Botanically they are of the family Dipterocarp, genus Shorea. Genuine mahogany is the product of the mahogany tree, which does not grow natu-

rally in the Philippines. It is of the family Melia, genus Swietenia.

The "Philippine mahogany" case has had three phases:

(1) Original proceedings before the Federal Trade Commission resulting in the decision in *Indiana Quartered Oak Co. v. F. T. C.*, 26 Fed. (2d) 340, enjoining the use of the word "mahogany" and the trade term "Philippine mahogany";

(2) Subsequent proceedings, reported in 58 Fed. (2d) 182, continuing the injunction against the use of the word "mahogany" but tolerating the trade term "Philippine mahogany";

(3) Reopened proceedings, still pending, in which the Commission is reconsidering its former action permitting the use of the trade term or "secondary use."

The Philippine hardwoods referred to in the Complaint are concededly the same red lauan, tanguile, etc., involved in the "Philippine mahogany" case.

Defendant Association is a membership corporation whose members, number unspecified, deal in genuine mahogany. Plaintiffs' only grievance is that defendant or its members have made statements, not produced in *verba hæc*, to the general effect that lauan, tanguile, etc., are not mahogany and that it is an improper trade practice to sell them as such or as "Philippine mahogany."

It is difficult to ascertain the theory of the Complaint. At most, it is a charge of trade libel or perhaps personal libel. Intermingled with allegations of this nature are paraphrases of the Anti-Trust acts.

The District Court and the Circuit Court (both on the original hearing and the rehearing) are in accord that the

Complaint states no cause of action under the Anti-Trust laws. They further agree that this reduces the case to one for disparagement of goods, in which Federal jurisdiction rests only on diversity of citizenship and statutory amount.

The issue, therefore, is reduced to the legal sufficiency of the allegations as to disparagement to sustain a cause of action in equity.

The District Court followed the established rule, applicable in Delaware, that disparagement of goods falls within the classification of "trade libel"; that the only cause of action for trade libel in Delaware is at common law for damages; and that as there is no right of action in equity in Delaware to restrain publication of a libel, the Complaint must be dismissed.

Even at common law, the Complaint was bad because it did not show special damage.

B. The original opinion in the Circuit Court.

In the Circuit Court, plaintiffs apparently realized the insuperable bar of the equity rule and contended that it did not apply because the true label of the action was "unfair competition."

Unfair competition is an entirely different tort; plaintiffs had not alleged any of the characteristic elements of such a cause of action, such as passing off, trademark infringement, civil conspiracy, physical interference with customers, boycott, name piracy, etc.; they rested solely on disparagement or trade libel, or perhaps personal libel.

The original opinion by Judge Clark agreed with the District Court that the cause of action was trade libel and nothing else; he also recognized that under the then prevailing rule in Delaware and elsewhere the only cause of action for trade libel was at law, and as the plaintiffs

failed to allege special damage, they could not recover at law. But he pointed out that for many years there had been academic revolt against this prevailing rule (see 29 Harvard Law Review 640), and he thereupon decided that the time had come to discard the rule and recognize a right of action in equity, stating that the inability to prove special damage was a compelling reason for granting the equitable remedy. He did this without considering the Delaware law.

C. The opinion on rehearing in the Circuit Court.

Defendants' petition for rehearing contended that under the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, a Federal court, in a diversity case, could not change the local law. It was further contended that the absence of damage destroyed the Federal jurisdiction.

As we understand the opinion on rehearing, the ruling is as follows:

(1) While a Federal court, in a diversity case, is bound by the substantive law of the State, and therefore would have no jurisdiction at equity of an action for trade libel if the local law gave none, there is an independent Federal equity law under which the Federal court has jurisdiction of such a cause of action in equity even though it is denied to the State court of equity.

(2) Although the local law restricts the cause of action for unfair competition to its traditional form of passing off and adheres to the rule that "trade libel" is an independent tort governed by its own rules, still the Federal court, in a diversity case, could expand the concept of "unfair competition" to include any form of trade practices "unfair" in the popular sense so as to include "trade libel"; and where

the local law gave a right in equity for *traditional* "unfair competition," the Federal court could enjoin trade libel. The opinion is not clear as to whether this conclusion is based: (a) On the right of the Federal courts to change the local law at common law or equity, or (b) to follow an independent course in all equity cases.

(3) The Court ruled that the allegations as to jurisdictional amount were insufficient, but gave plaintiffs leave to amend.

The opinion of Judge Clark clearly recognizes that the sole question now before the Federal Trade Commission is whether the "secondary" trade meaning of "Philippine mahogany" has been sufficiently established in the light of *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67. This necessarily implies that the original prohibition against calling lauan, tanguile, etc. "mahogany" is still applicable and there remains only the question if the secondary meaning is now deceptive.

The opinion on rehearing does not discuss this question, but rules definitely that if plaintiffs lose before the Commission, they will have no cause of action of any kind in any Court.

II. Jurisdictional Statement.

The final date of the judgment to be reviewed is June 10, 1942, the date of the judgment entered by the Circuit Court of Appeals after the rehearing. The judgment was rendered in a civil action.

The statute under which the jurisdiction of this Court is invoked is Section 240 (a) of the Judicial Code (28 U. S. C. A. Section 347 a).

The decision of the Circuit Court of Appeals holds that Federal equity courts can assume jurisdiction and grant relief in causes of action over which the local State equity

courts have no jurisdiction and where they can grant no relief, and also apparently holds that where a Federal equity court considers there is need for granting equitable relief, they may do so regardless of the state of the local law. The decision apparently also decides that Section 5 of Article I of the Constitution of Delaware of 1897 which provides: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty", does not prohibit the Delaware Courts of Chancery from enjoining the publication of libel and that under Delaware law a libel can constitute unfair competition. The judgment of the Circuit Court of Appeals therefore purports to decide important questions of local law in a way probably in conflict with applicable local decisions; and has decided an important question of federal law which has not been, but should be, settled by this court or has decided the federal question in a way probably in conflict with applicable decisions of this court so as to call for an exercise of this court's power of supervision.

The following cases are believed to sustain jurisdiction:

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188;

Ruhlin v. New York L. Ins. Co., 304 U. S. 202, 82 L. ed. 1290;

West v. American T. & T. Co., 311 U. S. 223, 85 L. ed. 139;

Klaxon Company v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. ed. 1477;

Pecheur Lozenge Co., Inc. v. National Candy Company, Inc., — U. S. —, 86 L. ed. 739.

III. Questions Presented.

The questions presented are of importance in clarifying, and applying the doctrine of the *Erie R. Co. v. Tompkins,* 304 U. S. 64, case to Federal equity jurisdiction in diversity cases and may be stated as follows:

(1) Is a Federal equity court, in a case where jurisdiction rests solely on diversity of citizenship, required to follow the local common law on the equity side as well as the local common law on the law side, or is there a general "Federal equity law" independent of the local equity law so that a Federal equity court can assume jurisdiction and grant relief on a cause of action over which the local State equity court has no jurisdiction and where it can grant no relief?

(2) Whether or not there is such independent general Federal equity law, has a Federal equity court, in a diversity case, the power to apply the local common law at law or equity in a different manner than as applied by the State court, even to the point of denying defendants a trial by jury which they could obtain on the same cause of action in the local State court?

Prayer.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7561, Black & Yates, Inc., Thomas E. Powe Lumber Company and

Walter G. Scrim, Plaintiffs-Appellants, v. Mahogany Association, Inc., and Thompson Mahogany Company, Defendants-Appellees, and that the said decree of the Circuit Court of Appeals for the Third Circuit reversing the judgment of the District Court for the District of Delaware may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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THOMPSON MAHOGANY COMPANY,
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v.

BLACK & YATES, INC., THOMAS E. POWE LUMBER COMPANY AND WALTER G. SCRIM,
(Plaintiffs-Appellants Below),
Respondents.

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition seeks a review of a decision of the Circuit Court of Appeals for the Third Circuit on rehearing, which reversed in part a decision of the District Court of Delaware, reported in 34 Fed. Supp. 450, holding that no cause of action was stated in the complaint on any theory and "Defendants here are the aggrieved parties". Neither opinion of the Circuit Court reviews the pleadings in detail; the opinion on rehearing refers to and apparently adopts the analysis of the District Judge. The first opinion was by Judge Clark, while the opinion on rehearing was by Judge Biggs. Neither has been reported.

The Court is respectfully referred to the Petition for a short and summary statement of the matter involved; the questions presented; the basis of jurisdiction, and the reasons urged for granting the writ.

I. Questions Presented, As Set Forth in the Petition.

(1) Is a Federal equity court, in a case where jurisdiction rests solely on diversity of citizenship, required to follow the local common law on the equity side as well as the local common law on the law side, or is there a general "Federal equity law" independent of the local equity law so that a Federal equity court can assume jurisdiction and grant relief on a cause of action over which the local State equity court has no jurisdiction and where it can grant no relief?

(2) Whether or not there is such independent general Federal equity law, has a Federal equity court, in a diversity case, the power to apply the local common law at law or equity in a different manner than as applied by the State courts, even to the point of denying defendants a trial by jury which they could obtain on the same cause of action in the local State courts?

II. Argument.

A. The doctrine of Erie R. Co. v. Tompkins, 304 U. S. 64, requires that in every case where Federal jurisdiction rests solely on diversity of citizenship, the local common law, which includes the principles of equity, is the "Rule of Decision". There is no independent Federal Equity Law. Therefore, a Federal Equity Court, in a diversity case, cannot assume jurisdiction, nor grant injunctive relief, where a State Equity Court cannot do so.

We submit that this Court did not limit the doctrine of *Erie R. Co.* to causes on the law side, but specifically directed that the local law was to be followed by Federal courts both on the law side and on the equity side. Both the law applicable on the law side and the law applicable on the equity side come within the "common law". At least that is the rule in Delaware. The common law of Delaware includes the principles of equity. See *Fox v. Wharton,* 5 Del. Ch. 200; *Lynch v. Hill,* 6 A. (2d) 614; *Continental Guaranty Corp. v. Peoples Bus Line* (Del., 1922), 117 A. 275, 279.

In *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, this Court pointed out the defects, political and social, which had resulted from applying the doctrine of *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865, and held there is "no Federal general common law". This Court construed Section 34 of the Federal Judiciary Act of 1789 to require that in any diversity of citizenship case in Federal courts, "the law to be applied in *any case* is the law of the State."

In *Ruhlin v. New York L. Ins. Co.,* 304 U. S. 202, 82 L. ed. 1290, this Court reviewed by writ of certiorari a

judgment of the Circuit Court of Appeals for the Third Circuit, in a case on the equity side. There the relief sought was rescission, an equitable right of action. This Court said that the doctrine of the *Erie R. Co.* case applied "though the question of construction arises not in an action at law, but in a suit in equity".

In *West v. American T. & T. Co.*, 311 U. S. 223, 85 L. ed. 139, we again find this Court ruling that in diversity cases even on the equity side, the local State law is to be applied.

The only cause of action pleaded in the instant case is that defendants injured plaintiffs by *words* which disparaged their goods and reflected upon their business ethics. The universal rule, applicable in the State Courts of Delaware, classifies the grievance as libel or trade libel [1] (see opinion of Judge Clark). It is equally clear that except as held below, the presently established American rule, applicable in Delaware, is that the only cause of action for libel or trade libel is at law to recover the special damages suffered thereby (*Edison v. Thomas Edison, Jr. Chemical Co.*, 128 Fed. 957 [Del.]). There is no cause of action in equity to restrain the publication of libel. That is the general American rule, so firmly fixed that as stated by Dean Pound in 29 Harvard Law Review, page 640, it can be changed only by legislation. The rule has been severely criticized

[1] Smith, *Disparagement of Property*, 13 Columbia L. Rev. 13; Pound, 29 Harvard L. R. 640; Nims on *Unfair Competition*, Third Ed. p. 697, § 262; *Francis v. Flinn*, 118 U. S. 385; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384; *Edison v. Thomas A. Edison Jr. Chemical Co.*, 128 Fed. 957 [Del.], citing the *Marlin* case; *Flint et al. v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804; *American Ball Co. v. Federal Cartridge Co.*, 70 Fed. (2d) 570 and note 98 A. L. R. 665.

academically, but the courts have adhered to it.[2] Indeed, the whole point of Judge Clark's opinion is that such is the existing Delaware law; and that the time has come to change it. Apparently the rehearing was granted in recognition of the fact that the doctrine of *Erie R. Co. v. Tompkins* forbids Delaware Federal Courts from changing the Delaware law.

On rehearing, the Circuit Court formulated a new and different theory. In effect, this attempts to create an exception to the doctrine of the *Erie R. Co.* case, by holding that there is an independent Federal equity law which may be applied in a diversity case in such manner as to result in the recognition of an equitable right of action denied by the local law; so that in this case the District Court is authorized to grant the relief which the State courts are prohibited from granting. If this be true, little remains of the *Erie R. Co.* doctrine and its principle that the same law is to be administered by the Federal Courts in a di-

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[2] The decisions: *Francis v. Flinn,* 118 U. S. 385; *Edison v. Thomas A. Edison Jr. Chem. Co.,* 128 Fed. 957 [Del.]; *Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384; *Citizens Light, Heat & Power Co. v. Montgomery etc. Co.,* 171 Fed. 553 [Ala.]; *Flint et al. v. Hutchinson Smoke Burner Co.,* 110 Mo. 492; *Singer Mfg. Co. v. Domestic Sewing Machine Co.,* 49 Ga. 70; *Prudential Assurance Co. v. Knott,* L. R. 10 Ch. App. 142; *Mulkern v. Ward,* L. R. (13 Eq. Cases) 619; *Brandreth v. Lance,* 8 Paige Ch. Rep. (N. Y.) 24; *Kidd v. Horry,* 28 Fed. 773; *American Malting Co. v. Keitel,* 209 Fed. 351. See also Pomeroy's Equity Jurisprudence, 4th ed., Vol. 5, Sec. 2050 (Sec. 629).

The academic criticism: Pound, 29 Harvard L. R. 640; Derenberg on *Trade Mark Protection and Unfair Trading,* p. 142; Handler, *Unfair Competition,* 21 Iowa L. R. 175, 190-191; 40 Columbia L. R. 341 (Note); 19 Cornell L. Q. 63; 47 Yale L. R. 1304; Chaffee, 53 Harvard L. R. 1289; Prosser on *Torts,* Ch. 20, 972. For the latest discussion, still recognizing the universal rule and especially as to "group libel", see 42 Columbia L. R. 727 (May 1942) particularly at page 774.